

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

V.

DAVID BERNHARDT, in his official capacity as Secretary of the United States Department of the Interior; AURELIA SKIPWITH, in her official capacity as Director of the U.S. Fish and Wildlife Service; U.S. FISH AND WILDLIFE SERVICE;

Defendants.

Case No. 3:20-cv-00333-KJD-CLB

STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement (“Agreement”) is entered into by and between Plaintiff Center for Biological Diversity (“Center”) and Defendants David Bernhardt, in his official capacity as Secretary of the United States Department of the Interior, Aurelia Skipwith, in her official capacity as Director of the United States Fish and Wildlife Service (“Service”), and the Service (collectively, “Defendants”), who, by and through their undersigned counsel, state as follows:

WHEREAS, on June 27, 2014, the Service received a petition requesting that the distinct population segment of relict dace (*Relictus solitarius*) located at Big Spring, about 4 miles south of Oasis, Nevada, in the southwest corner of Section 27, T. 36 S., R. 66 E., Mount Diablo Base & Meridian (MDB&M), in Elko County, Nevada be listed as an endangered species under the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 *et seq.*, on an emergency basis;

WHEREAS, on August 25, 2014, the Service responded to the petition that it reviewed the information presented and did not find that the species warranted emergency listing under the ESA;

1 WHEREAS, on April 10, 2015, the Service issued a 90-day finding pursuant to 16 U.S.C.
2 § 1533(b)(3)(A), concluding that the petition presented substantial scientific or commercial
3 information indicating that listing the relict dace under the ESA may be warranted, *see* 80 Fed.
4 Reg. 19259 (April 10, 2015);
5

6 WHEREAS, on November 20, 2019, the Center sent Defendants a letter stating its intent
7 to file suit to compel the Service to issue a 12-month finding pursuant to 16 U.S.C. § 1533(b)(3)(B)
8 as to whether listing the relict dace under the ESA is warranted, not warranted, or warranted but
9 precluded;

10 WHEREAS, on January 17, 2020, the Service sent a response to the Center's notice letter
11 explaining that an updated workplan for species listings, including the relict dace, was issued in
12 2019, in which the Service set forth reprioritized actions in accordance with its Prioritization
13 Methodology, 81 Fed. Reg. 49248 (July 27, 2016), based on the conservation needs of the species,
14 the Service's field office workloads, and a \$2 million reduction in the Service's listing budget after
15 creation of its 2016 workplan;
16

17 WHEREAS, under the Service's updated 2019 National Listing Workplan, the Service set
18 forth a target to complete a 12-month finding for the relict dace by the end of Fiscal Year 2020;

19 WHEREAS, on June 1, 2020 the Center filed a complaint in the above-captioned action to
20 compel the Service to issue a 12-month finding as to whether the listing of the relict dace is
21 warranted, not warranted, or warranted but precluded;

22 WHEREAS, the parties, through their authorized representatives, and without any
23 admission or final adjudication of the issues of fact or law with respect to the Center's claims, have
24 reached a settlement that they consider to be a just, fair, adequate, and equitable resolution of the
25 disputes set forth in the Center's complaint;
26

1 WHEREAS, the parties agree that settlement of this action in this manner is in the public
2 interest and is an appropriate way to resolve the dispute between them;

3 NOW, THEREFORE, the parties hereby stipulate and agree as follows:

4 1. On or before November 30, 2020, the Service shall submit to the Office of the
5 Federal Register for publication a 12-month finding as to whether listing the relict dace is
6 warranted under the ESA, 16 U.S.C. § 1533(b)(3)(B);

7 2. The order entering this Agreement may be modified by the Court upon good cause
8 shown, consistent with the Federal Rules of Civil Procedure, by written stipulation between the
9 parties filed with and approved by the Court, or upon written motion filed by one of the parties
10 and granted by the Court. In the event that either party seeks to modify the terms of this Agreement,
11 including the deadline specified in paragraph 1, or in the event of a dispute arising out of or relating
12 to this Agreement, or in the event that either party believes that the other party has failed to comply
13 with any term or condition of this Agreement, the party seeking the modification, raising the
14 dispute, or seeking enforcement shall provide the other party with notice of the claim or
15 modification. The parties agree that they will meet and confer (either telephonically or in person)
16 at the earliest possible time in a good-faith effort to resolve the claim before seeking relief from
17 the Court. If the parties are unable to resolve the claim themselves, either party may seek relief
18 from the Court.

19 3. In the event that the Service fails to meet the deadline specified in paragraph 1 and
20 has not sought to modify this Agreement, the Center's first remedy shall be a motion to enforce
21 the terms of this Agreement, after following the dispute resolution procedures described above.
22 This Agreement shall not, in the first instance, be enforceable through a proceeding for contempt
23 of court.

1 4. This Agreement requires only that the Service take the action specified in paragraph
2 1. No provision of this Agreement shall be interpreted as, or constitute, a commitment or
3 requirement that Defendants take action in contravention of the ESA, the Administrative Procedure
4 Act (“APA”), or any other law or regulation, either substantive or procedural. Nothing in this
5 Agreement shall be construed to limit or modify the discretion accorded to the Service by the ESA,
6 the APA, or general principles of administrative law with respect to the procedures to be followed
7 in making any determination required herein, or as to the substance of any determination made
8 pursuant to paragraph 1. To challenge any final determination issued in accordance with this
9 Agreement, the Center will be required to file a separate action, and Defendants reserve the right
10 to raise any applicable claims or defenses in response thereto.

12 5. The obligations imposed on the Service under this Agreement can only be
13 undertaken using appropriated funds. No provision of this Agreement shall be interpreted as, or
14 shall constitute, a commitment or requirement that the United States is obligated to pay funds or
15 take any action in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other
16 provisions of law.

18 6. No part of this Agreement shall have precedential value in any litigation or in
19 representations before any court or forum or in any public setting. No party shall use this
20 Agreement or the terms herein as evidence of what does or does not constitute a reasonable
21 timeline for issuing a 12-month listing decision for any petitioned species.

23 7. Nothing in this Agreement shall be construed or offered as evidence in any
24 proceeding as an admission or concession of any wrongdoing, liability, or any issue of fact or law
25 concerning the claims settled under this Agreement or any similar claims brought in the future by
26 any other party. Except as expressly provided in this Agreement, the parties do not waive or
27 relinquish any legal rights, claims, or defenses they may have. This Agreement is executed for the
28

1 purpose of settling the Center's complaint, and nothing herein shall be construed as precedent
2 having preclusive effect in any other context.

3 8. The parties agree that this Agreement was negotiated in good faith and it constitutes
4 a settlement of claims disputed by the parties. By entering into this Agreement, the parties do not
5 waive any legal rights, claims, or defenses, except as expressly stated herein. This Agreement
6 contains all of the terms of agreement between the parties concerning the Center's complaint, and
7 is intended to be the final and sole agreement between the parties with respect thereto. The parties
8 agree that any prior or contemporaneous representations or understandings not explicitly contained
9 in this written Agreement, whether written or oral, are of no further legal or equitable force or
10 effect.

11 9. The undersigned representatives of each party certify that they are fully authorized
12 by the party or parties they represent to agree to the terms and conditions of this Agreement and
13 do hereby agree to the terms herein. Further, each party, by and through its undersigned
14 representative, represents and warrants that it has the legal power and authority to enter into this
15 Agreement and bind itself to the terms and conditions contained in this Agreement.

16 10. The terms of this Agreement shall become effective upon entry of an order by the
17 Court approving the Agreement.

18 11. Upon approval of this Agreement by the Court, all counts of the Center's complaint
19 shall be dismissed with prejudice. Notwithstanding the dismissal of this action, however, the
20 parties hereby stipulate and respectfully request that the Court retain jurisdiction to oversee
21 compliance with the terms of this Agreement and to resolve any motions to modify such terms.

22
23
24
25 *See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994).*

26 Respectfully submitted this 15th day of September 2020.
27
28

1
2 **PLAINTIFF CENTER FOR BIOLOGICAL
DIVERSITY**

3
4 **DEFENDANTS DAVID BERNHARDT,
AURELIA SKIPWITH, AND THE UNITED
STATES FISH AND WILDLIFE SERVICE**

5
6 */s/ Christopher W. Mixson*

7 Christopher W. Mixson
Nevada Bar No. 10685
8 Wolf, Rifkin, Shapiro, Schulman & Rabkin,
LLP
5594-B Longley Lane
Reno, Nevada 89511
775-853-6787
cmixson@wrslawyers.com

9 *Attorneys for Plaintiff*

10 JEAN E. WILLIAMS, Deputy Assistant
11 Attorney General
12 SETH M. BARSKY, Section Chief
MEREDITH L. FLAX, Assistant Section Chief

13 */s/ Michelle M. Spatz*

14 MICHELLE M. SPATZ
D.C. Bar No. 1044400
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Wildlife and Marine Resources Section
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044-7611
Tel: (202) 598-9741
Fax: (202) 305-0275
E-mail: michelle.spatz@usdoj.gov

15 *Attorneys for Defendants*

16 IT IS SO ORDERED:



17
18
19 **UNITED STATES DISTRICT JUDGE**

20 DATED: September 30, 2020